No. 95-1441

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director,
Arizona Department of Economic Security,
in her official capacity,

*Petitioner,*

v.

CATHY FREESTONE, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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## INTRODUCTION

Unable to hide the split in the circuits concerning the availability of private actions under 42 U.S.C. § 1983 to enforce the provisions of Title IV-D of the Social Security Act that warrants review by this Court, Respondents attempt to distort the facts, relevant case law, and public policy implications of their suit in a misguided effort to persuade the Court not to hear this case. For example, despite their knowledge that the United States Department of Health and Human Services issued a public letter in 1994 declaring that Arizona had "achieved substantial compliance" with Title IV-D's requirements, Respondents assert that Arizona is not in compliance by referring to alleged improprieties between 1980 and 1992. Similarly, despite the acknowledgment by the majority panel below that "there is a three-way split of authority as to the availability of a § 1983 action to enforce Title IV-D" (Pet. App. at 10a) and that "federal courts have splintered on the question of whether a § 1983 action is available to enforce Title IV-D" (*id.* at 2a), Respondents still assert that no conflict exists between the circuits. Additionally, despite their complaint that the mechanism that Congress designed to enforce Title IV-D's requirements operates "at the expense of Title IV-D beneficiaries receiving AFDC" (Response at 10 n.1), Respondents ignore the indisputable fact that their lawsuit drains valuable resources from recipients of Title IV-D services. Thus, Respondents fail at the factual, legal, and policy levels to dispel the urgent need for this Court to grant review of the issue presented in this case.

## STATEMENT OF THE CASE

Respondents' Statement of the Case mischaracterizes this case and the entire Title IV-D program. For example,

Respondents challenge Petitioners' statement that Arizona's implementation of a new corrective action plan prompted the United States Department of Health and Human Services ("Secretary") to find in a follow-up audit that Arizona's child support enforcement program "had achieved 'substantial compliance'" with Title IV-D. (Resp. at 1.) Yet, as Respondents know full well, on September 20, 1994 (after the district court had entered summary judgment, thus preventing Arizona from putting it in the record), the Secretary sent a public letter declaring that "Arizona has achieved substantial compliance." (Reply App. at 1a.)[1]

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[1] Respondents complain that the State Director did "not elaborate on the remark" that the Secretary determined that Arizona had achieved substantial compliance. (Resp. at 1.) Respondents then refer repeatedly to "the record before the Court of Appeals," pretending that time and events stopped in 1993 when the district court granted summary judgment to the State Director. On the other hand Respondents then argue that the reasoning in *Carclli v. Howser*, 923 F.2d 1208 (6th Cir. 1991), is not applicable to the present case because Arizona's efforts "bore no resemblance to the extensive reform efforts, promising substantial compliance with Title IV-D, underway at the time *Carelli* was decided." (Resp. at 10.) Respondents cannot have it both ways. As the Secretary's letter demonstrates, Arizona had been engaged in extensive reform efforts at the time that the district court issued its decision, and Arizona ultimately achieved substantial compliance through these efforts. (Reply App. at 1a.)

The Response cites to a 1991 State Auditor General report and other facts alleged before 1993 to paint a dismal picture of Arizona's child support enforcement program. Yet Respondents knew about the Secretary's 1994 positive determination when they painted that picture, and they knew from the Answer filed in this case on March 7, 1996, that Arizona's extensive reform efforts had earned recognition in 1994 as the Most Improved Program from the National Child Support Enforcement Association, selection in 1994 for the Exemplary State and Local Award from the National Center for Public Productivity at Rutgers University, which recognizes significant achievement and innovation in state and local government, and commendation in 1995 by the Department of Health and Human Services for exceeding the program performance goals that the state and federal governments jointly established.

The State Director provides this elaboration that Respondents invited not to claim that Arizona's program is perfect, but to (a) expose Respondents' disingenuous attempt to paint an inaccurate picture and (b) show that Arizona would be treated differently if it were located in the Sixth Circuit where the *Carelli* standard applies.



Respondents also attempt to mislead the Court by characterizing corrective action plans as remedial proposals that state administrators unilaterally advance. (Resp. at 10-11 n.1.) The Secretary will approve such plans only if they contain steps necessary to achieve substantial compliance within a period that the Secretary finds to be appropriate, and the Secretary closely monitors States whose plans have been approved to ensure that they successfully implement the plans within that period. *See* 42 U.S.C. § 603(h)(2)(A)(i)-(iii), Pet. App. at 2d. Indeed, the oversight and enforcement scheme that Congress enacted is so comprehensive that it demonstrates Congress' intent not to create privately enforceable rights. *See infra* at 7.

## REASONS FOR GRANTING THE PETITION

### 1. A Conflict Does Exist Between the Decision Below and Those of Other Circuit Courts.

No amount of dodging, twisting, or weaving can avoid the plain truth that even the Ninth Circuit majority panel recognized:

- "Currently, there is a three-way split of authority as to the availability of § 1983 to enforce Title IV-D" (Pet. at 10a);
- "A few courts have concluded that Title IV-D creates no enforceable rights . . . [whereas a] majority of courts has found that it does" (*id.*, citations omitted); and
- "The federal courts have splintered on the question of whether a § 1983 action is available to enforce Title IV-D." (*Id.* at 2a.)

Indeed, despite Respondents' attacks on the validity of the Sixth Circuit's decision in *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991), and the Eleventh Circuit's decision in *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989), the fact remains that the decisions limit the ability of custodial parents in those two circuits to sue the States, counties or other local units of government that administer their Title IV-D programs. Even under Respondents' reading of *Carelli*, where a plaintiff's complaint seeks relief with respect to the same aspects of a IV-D program that are the subject of an ongoing federal audit, the federal courts in the Sixth Circuit will not permit the plaintiff to maintain the action because to do so could unduly interfere with the oversight functions that Congress has committed to the Secretary. Moreover, under *Wehunt*, residents of the Eleventh Circuit cannot bring an action to privately enforce Title IV-D's provisions at all. *See* 875 F.2d at 1566-68.

It is one thing to disagree with the reasoning behind *Carelli* and *Wehunt*. Respondents will have the opportunity to make this argument in their merits brief. To argue now, however, that the two decisions do not conflict with those of the First, Eighth, and Ninth Circuits is simply wrong. The resolution of this conflict alone is sufficient reason for this Court to grant the Petition.



**2. The Ninth Circuit's Decision Conflicts with Relevant Precedents of This Court.**

Respondents' assertion that *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1980), and *Suter v. Artist M.*, 503 U.S. 347 (1992), are irrelevant is plainly incorrect. Title IV-D gives the States no notice that acceptance of federal funding for child support enforcement programs will subject States to the obligations asserted in Respondents' 42 U.S.C. § 1983 action. While Title IV-D informs the States that they must attain substantial compliance to avoid an enforcement action by the Secretary, it does not unambiguously inform the States that they may be subject to costly private suits for failing to comply with Title IV-D.

This Court has often characterized Spending Clause programs as contractual in nature. However, these contracts, unlike those entered into between private parties, are permeated by constitutional considerations. In *Pennhurst*, this Court explained that Congress must unambiguously impose any conditions upon the receipt of federal funds under a Spending Clause program:

> Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we

> enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations omitted). Holding that the provision at issue in *Pennhurst* failed to give such unambiguous notice, the Court reversed the court of appeals' finding that permitted a 42 U.S.C. § 1983 action to enforce the provision.

In *Suter*, the Court similarly refused to permit 42 U.S.C. § 1983 to be used to enforce the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670-679a, because it found that the Act did not unambiguously confer any enforceable rights upon its beneficiaries. 503 U.S. at 363. *Suter* is therefore consistent with core principles of federalism because the requirement that a federal act unambiguously confer an enforceable right upon its beneficiaries before they may enforce the right through private suits is simply the correlative of the requirement that States receive unambiguous notice that they will be subject to such suits as a condition of accepting federal funds under a Spending Clause program.

Respondents do not address, much less explain, how a "substantial compliance" standard of seventy-five percent informs the States that by accepting Title IV-A money they are obligated to fund a new entitlement program and substantive, individual rights to child support enforcement services for each custodial parent who requests such services. Such a standard does not provide the unambiguous notice *Pennhurst* and *Suter* require.[2]

---

[2] Indeed, Respondents admitted as much by "accept[ing] the State Director's summation" (Resp. at 1) that "Congress did not explicitly or implicitly authorize a private right of action to enforce" Title IV-D and "Congress expressly granted enforcement authority to the Secretary." (Pet. at 3.)



Moreover, the unique remedial scheme of Title IV-D indicates that Congress did not intend to create rights enforceable by private persons. First, Congress established a three-tiered reduction in funding based on the number of consecutive findings by the Secretary of a State's failure to comply substantially with its Title IV-D plan. 42 U.S.C. § 603(h)(1). Second, Congress permitted the Secretary to suspend the funding reduction, even when a State's Title IV-D program does not substantially comply, if the State submits a corrective action plan that contains steps necessary to achieve substantial compliance. 42 U.S.C. § 603(h)(2). Thus, in some circumstances federal funding is not withdrawn even when the State has not achieved substantial compliance. Again, this shows congressional intent to allow the States the greatest amount of flexibility in coming into compliance and is inconsistent with an intent to permit individual enforcement rights. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1133 (1996) ("the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be imposed upon a state officer under *Ex parte Young* [209 U.S. 123 (1908)] strongly indicates that Congress had no wish to create" "an action under *Ex parte Young* that would expose that official to full remedial powers of a federal court, including, presumably, contempt powers").

Finally, in light of the State's fundamental interest in protecting its sovereignty, *see Seminole Tribe*, 116 S. Ct. at 1122, 1129-30, States should not be subjected to § 1983 suits to enforce Spending Clause enactments (such as Title IV-D) unless the States are given explicit notice and thereby knowingly agree to subject themselves to the full remedial powers of the federal court. In rejecting the

argument that the receipt of federal funds constituted a waiver of sovereign immunity, this Court has stated:

> [t]he Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity. Thus, were we to view this statute as an enactment pursuant to the Spending Clause, Article 1, § 8 . . . , we would hold that there is no indication that the State of California consented to federal jurisdiction.

*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985).

Respondents also dispute Arizona's contention that their Article III standing is questionable because a court could only speculate as to whether the relief they request would redress any particular plaintiff's injuries. Although Respondents may be able to identify additional actions that Arizona could have taken in their cases, they cannot establish that Arizona's failure to take these actions caused them not to receive child support payments or that they are likely to receive payments if Arizona takes the actions. As Judge Kleinfeld noted in his dissent below, even a child support enforcement program that substantially complies with federal requirements may be unable to secure payments from a noncustodial parent who is intent upon avoiding collection attempts. (*See* Pet. App. 43a-44a.) The ex-husbands of Respondents Freestone and Harrington, for example, fall into this category. *See* Pet. App. 5a-6a (fathers changed jobs to avoid meeting their child support obligations).

Congress clearly based the substantial compliance standard upon its understanding that recalcitrant noncustodial parents and other factors beyond a child support enforcement agency's control may dictate whether a particular custodial parent receives child support payments. Congress' recognition that there is no necessary cause



and effect relationship between a child support enforcement agency's efforts to collect payments on behalf of an individual parent and the parent's receipt of such payments indicates that Respondents lack Article III standing and that Congress did not intend the IV-D program to create rights that individual parents could enforce through § 1983 actions.

Thus, the court of appeals decision does conflict with this Court's precedents.

### 3. The Ninth Circuit's Decision Undermines Principles of Federalism and the Effectiveness of Title IV-D Programs.

Respondents question whether the decision below will engender similar litigation against officials administering Title IV-D programs in the nine States that comprise the Ninth Circuit. (Resp. at 3.) Yet concern about the vagaries of the lower courts' inconsistent rationales and the resulting extreme financial exposure has prompted thirty-nine jurisdictions (thirty-six States – including every State in the Ninth Circuit – plus the District of Columbia, Guam, and the Virgin Islands) to file an amicus brief "urg[ing] this Court in the strongest terms to grant the Petition." States' Amicus Brief at 1.

* * *

Because Congress enacted Title IV-D to achieve a uniform approach to a national problem, child support enforcement program administrators in Plains, Georgia, and Phoenix, Arizona, should operate under the same statutory constructs. The five different court of appeals decisions, together with the differing rationales that many other lower courts have applied, clearly demonstrate that there is no national uniformity on the issue of whether a private cause of action exists under 42 U.S.C.

§ 1983 to enforce the provisions of Title IV-D. It is fundamentally unfair to the Title IV-D administrators, custodial parents, and taxpayers of the various States that their rights and liabilities under this national program are being determined by the happenstance of their residence rather than through the consistent interpretation of the law.

## CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 20, 1994

Ms. Linda J. Blessing
Director
Department of Economic Security
1717 West Jefferson Street
Phoenix, AZ 85007

Dear Ms. Blessing:

We have completed a follow-up review to determine whether the Arizona Child Support Enforcement (IV-D) program has achieved substantial compliance with the unmet criteria cited in our March 2, 1992 Penalty Notice. Based on the findings of the Follow-up review report (AZ-90-FR1) issued on May 4, 1994, I am pleased to inform you that a determination has been made that the State has achieved substantial compliance and the penalty is hereby rescinded.

The initial audit conducted for the period January 1 through December 31, 1989, indicated that Arizona had been found not to have complied substantially with the requirements of Title IV-D of the Social Security Act. On March 2, 1992, Arizona was informed that total payments

to the State under Title IV-A of the Act would be reduced by 1 percent, beginning with the quarter commencing January 1, 1992, and that imposition of the penalty would be suspended if the State submitted a corrective action plan to the ACF Regional Administrator, Region IX, within 60 days of the date of the Notice, and the plan was approved by OCSE.

On July 31, 1992, we notified Arizona that the corrective action plan was approved and imposition of the penalty had been suspended. The corrective action period ended on March 1, 1993. Arizona had the full responsibility for attaining substantial compliance with the unmet criteria cited in the Penalty Notice during the corrective action period.

Arizona's diligence in rectifying the problems identified in our audit has resulted in a recision of the penalty. We appreciate your cooperation in strengthening the Child Support Enforcement program in your State.

Please note that the audit report includes findings that are not addressed in this Notice. These findings involve: (1) Recommendation(s) that the State was not in substantial compliance with title IV-D requirements considered by OCSE to be technical in nature; (2) recommendation(s) regarding financial disallowance(s) or questioned costs; and/or (3) recommendation(s) related to improving program or financial management. The ACF Regional Office will contact the State regarding the audit resolution



process for tracking and clearing these findings, and the specific findings to be covered under the process.

Sincerely,

/s/ Mary Jo Bane
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